seizure clause in the hire-purchase agreement did not amount to a penalty within the meaning of section 74 of the Contracts Act which is equivalent to section 75 of our Contracts (Malay States) Ordinance, 1950. In the Indian case of *Enayatullah Khan* v. *Jalan Trading Co. & Anor.*,[14] there was a dispute as to whether the contract was one of hire-purchase or of sale a stipulation in the contract that the owner was to seize the car in default of payment of instalments by the hirer. The hirer pleaded that by subsequent oral agreement the owner was to sell the car and to adjust the price towards the balance of instalments and to refund the balance of sale proceeds to the hirer, and that thus it was a contract of sale. It was held that the plea itself conceded that the contract was of simple hire-purchase. The defence case as to the subsequent oral agreement having been disbelieved, it was held that there was nothing left on the record to give support to the claim of the appellant that the price of the car seized from him should have been set off as against the hire instalments which were still left due against the appellant. It is clear that none of those three cases is of any help to the respondent.

The main ground of appeal here is that the learned trial judge misdirected himself in law in that he failed to distinguish between the claim for arrears of monthly hire-rent under clause 1 of the agreement and the claim by way of compensation for depreciation under clause 6. The other substantial ground of appeal is that no case had been made out by the respondent for equitable relief which could exempt him from liability to pay hire-rent. In my judgment the appellants are entitled to succeed on both those grounds of appeal.

I would therefore allow the appeal, set aside the judgment of the learned trial judge and substitute in its place judgment for the plaintiffs in the sum of $19,788 in respect of arrears of hire-rent and $500 in respect of repossession charges, making a total of $20,288 with interest as claimed. The respondent must pay the costs of this appeal and the costs in the court below.

Azmi L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Lovelace & Hastings; Richard Talalla & Co.*

PUBLIC PROSECUTOR v. TANG CHEW WENG

[A.Cr.J. (Chang Min Tat J.) February 14, 1969]
[Ipoh — Perak Criminal Appeal No. 48 of 1968]

Dangerous Drugs — Possession of opium — Opium found in bags in berth of accused on railway coach — Accused found sleeping in berth — Whether accused could be said to be in possession of opium — Dangerous Drugs Ordinance, 1952.

The facts in this case were that in the course of the search of the night mail train from Penang the police found opium in two bags which were in the sleeping berth occupied by the accused on the train. The accused was found sleeping in the berth. The learned president of the sessions court acquitted the accused at the close of the prosecution case as he said "As far as I am aware of there is no law to say or presume that a sleeping man is conscious of anything at all". The Public Prosecutor appealed.

Held, allowing the appeal: the learned president was wrong in holding that a person otherwise in custody or possession loses the awareness of the custody or possession when he is asleep and in this case the accused should have been called upon to enter on his defence.

MAGISTRATE'S CRIMINAL APPEAL.

M. Mahalingam (Deputy Public Prosecutor) for the appellant.

Soo Wai Sun (*Mariadass* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: The respondent was charged in the Sessions Court at Ipoh with the offence punishable under section 6 of the Dangerous Drugs Ordinance No. 30 of 1952 of being found in possession of 16½ lbs. of raw opium valued at about $2,475. At the close of the case for the prosecution the respondent was acquitted and discharged on the finding of the learned president, after submissions, that no *prima facie* case had been made out against him. Against that decision, the public prosecutor now appeals.

The case for the prosecution was based on the evidence of two police inspectors, a detective sergeant and a detective corporal. These witnesses were in a police party which boarded the night mail from Penang on 26th June, 1968 at about 1.30 a.m. The party split into two and entered coach D at both ends, thus effectively sealing the coach against any escape. It was a coach for sleeping berths. Inspector Quah Hock Lye (P.W.2) went up to berth No. 27 which would appear to be an upper berth, parted the two curtains which had been drawn and knotted and found the accused sleeping therein. He was alone. Inside his berth were two bags, one at his feet and the other on the shelf by the side. The two bags were taken possession of and the accused was arrested.

Chemical analysis established that the contents of the bags were raw opium.

On this evidence which was largely undisputed by the defence, counsel for the accused submitted that the accused had no awareness of the nature of the goods found near him and therefore the case against him had not been proved, no presumption could be raised against him and he was entitled to be acquitted. This submission found favour with the learned president. In his grounds of decision, the learned president held that:—

". . . . there was no evidence at all that the accused had in his custody or under his control consciously or otherwise of the two bags. It was no doubt presumable what being found in that position the accused must be the possessor of the two bags but since these two bags were found there while the accused was fast asleep it was also equally presumable that someone else might have placed those two bags there without the knowledge of the accused."

Later on, he went on to say:—

"As far as I am aware of there is no law to say or presume that a sleeping man is conscious of anything at all."

In his view, where another inference other than the adverse one could be drawn and it was an inference favourable to the accused, he must draw this favourable inference. He accordingly acquitted the accused, without calling on his defence.

Before me, learned counsel for the respondent sought to maintain the acquittal and the reasoning of the learned president.

In my view his argument is fallacious. Carried to its logical conclusion, it would involve that in the case of a person who was wide-awake and was in such proximity and in such circumstances to dangerous drugs as to lead otherwise to the reasonable inference of custody or possession within the meaning of the Ordinance the prosecution would have to prove that at the moment of detection the person was consciously and actively aware of his custody or possession. In other words, mental absenteeism at the pertinent time was sufficient as a defence. To say that a person otherwise in custody or possession loses the awareness of his custody or possession when he falls asleep is, in my opinion and with respect, to misunderstand or to misinterpret the physiological relationship between sleep and consciousness.

As for the suggestion that the bags of opium could have been put on or next to the sleeping accused, that is, with respect, in the absence of any evidence of any one nearby with access to the sleeping-berth, a defence for the accused to put up and not be anticipated, least of all, by the trial president.

The appeal must be allowed. The order of acquittal is set aside. Since the president, who heard the case, is no longer functioning as president, the order will be for a trial *de novo* before another president.

Appeal allowed.

Solicitors: *Soo Wai Sun & Co.*

ANG TECK KIAT v. SAPIAH BINTE ALI & ANOR.

[A.C.J. (Pawan Ahmad J.) February 22, 1969]
[Malacca — Civil Appeal No. 3 of 1967]

Landlord and Tenant — Land let as vacant land, but buildings subsequently erected thereon — Whether "premises" within the meaning of the Control of Rent Ordinance, 1956 — Contract of tenancy specifying event upon which tenancy is to be determined — Whether notice to quit required before application for possession — Control of Rent Ordinance, 1956, s. 12(1).

The appellant had let land, on which a temporary building had been built, to one Mat bin Bidin under a written agreement which provided that on the death of Mat bin Bidin, his heirs. executors, administrators or assigns must quit the land except at the discretion of the landowner. After the death of Mat bin Bidin the appellant claimed that the tenancy expired on the date of the death and he claimed possession of the land.

Held, dismissing the appeal: (1) the temporary building falls within the definition of "premises" under the Control of Rent Ordinance, 1956, and was therefore protected by the Ordinance;

(2) as the appellant had failed to take any steps required of him under section 12(1)(*l*) of the Control of Rent Ordinance, 1956, he could not succeed in a claim for possession of the land.

Case referred to:—

(1) *Veerapillai* v. *Oci Swee Hoe* [1961] M.L.J. 260 at p. 263.

MAGISTRATE'S CIVIL APPEAL.

H.B. Ball for the appellant.

John Ang Soon Hoe for the respondents.

Cur. Adv. Vult.

Pawan Ahmad J.: This is an appeal against the decision of the learned president of the Sessions, Court at Malacca dismissing the appellant's claim for recovery of possession of land and consequential reliefs.

Briefly, the facts are as follows. The appellant became the registered owner of the land in question on 4th September, 1944 and on that date there was already a temporary building on the land belonging to and occupied by one Mat bin Bidin. On 25th April, 1960 the appellant and Mat bin Bidin entered into a written agreement, Exhibit P.1. Clause 2 of the aforesaid agreement states, and I quote:—

"On the death of Enche Mat bin Bidin, his heirs, executors, administrators or assigns must quit the land